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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX
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SAN FRANCISCO, CALIFORNIA 94105

| | | |
|---------------------------|---|--------------------------------|
| In the Matter of: |) | Docket No. FIFRA-09-2009-0013 |
| |) | |
| Bug Bam Product, LLC; and |) | MOTION SEEKING INITIATION OF |
| Flash Sales, Inc. |) | ALTERNATIVE DISPUTE RESOLUTION |
| |) | PROCESS |
| Respondents |) | |
| |) | |

I. INTRODUCTION

Complainant, the United States Environmental Protection Agency, Region IX (“EPA”), submits this Motion Seeking the Initiation of Alternative Dispute Resolution (“ADR”) Process (“Motion”). Through this Motion, Complainant requests that the Presiding Officer, Judge Barbara Gunning, issue an order providing the opportunity for the parties to this proceeding, namely the Complainant, EPA, the existing respondent, Bug Bam, LLC (“Bug Bam”), and the new respondent, Flash Sales, Inc., (“Flash Sales”), to partake in the ADR process sponsored by

the Administrative Law Judge (“ALJ”) Office prior to issuance of a prehearing order. This Motion is warranted because a new party, Flash Sales, has been added to the action. After consulting with both Bug Bam and Flash Sales on this Motion on or around March 10, 2010, Bug Bam decided to join this Motion and Flash Sales failed to indicate a preference. *See Attachment A* (with settlement privileged information redacted).

II. BACKGROUND

Complainant first commenced this civil administrative action by filing a Complaint and Notice of Opportunity of Hearing on September 18, 2009 (the “Complaint”) against Bug Bam citing three counts of violation of Section 12(a)(1)(A) of the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136j(a)(1)(A) (the “Act”) for illegally distributing or selling unregistered pesticides. Bug Bam filed its Answer dated October 15, 2009. The Complainant and Bug Bam did not engage in ADR as part of this initial proceeding.

On November 18, 2009, Complainant filed a Motion for Leave to File the First Amended Complaint seeking, among other things, to add a new jointly and severally liable respondent to the proceeding, Flash Sales. On January 7, 2010, the Presiding Officer granted that motion. Complainant filed and served the Amended Complaint on Flash Sales and Bug Bam on January 28, 2010. Complainant has already received Bug Bam’s Amended Answer, but still has not received Flash Sales’ Answer.

III. STANDARD OF REVIEW AND MOTION

The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“Consolidated Rules”), 40 C.F.R. Part 22 do not expressly authorize motions such as this one. However, Section 22.16 of

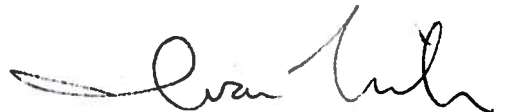
the Consolidated Rules refers to motions without restriction, and ALJs have considered various types of motions under this provision. Moreover, under 40 C.F.R. § 22.18(b), EPA expressly encourages settlement proceedings at any time, especially if the settlement is consistent with the Act's provisions and regulations. ADR is designated as a means to facilitate voluntary settlement efforts, *see* 40 C.F.R. § 22.18(d), and would be consistent with the enforcement provisions and goals of the Act.

As a new respondent to this action, Flash Sales should be offered the opportunity to engage in ADR. Granting this Motion for initiation of the ADR process may also benefit this forum by conserving resources if the parties agree to ADR and can successfully resolve the claims without the need for further litigation. Granting this Motion will also provide consideration to the status of the respondents as small businesses.

For the reasons set forth herein, Complainant and Bug Bam hereby move the Presiding Officer to issue an order initiating the ADR process sponsored by the ALJ Office by providing the opportunity to the parties to partake in ADR prior to the issuance of a prehearing order pursuant to 40 C.F.R. §§ 22.16 and 22.18(d).

Respectfully submitted,

DATED: 3/12/10



Ivan Lieben
Assistant Regional Counsel
USEPA, Region IX

ATTACHMENT A

RE: FW: Bug Bam; EPA FIFRA-09-2009-0013
Marrapese, Martha
to:
Ivan Lieben
03/11/2010 12:17 PM
Show Details

History: This message has been forwarded.
Dear Mr. Lieban,

Thank you for providing us with notice concerning EPA's intent to file its motion to reinstate the opportunity for ADR.

Today we filed our Motion to Dismiss EPA's Amended Complaint to return our client to its position in this matter prior to the granting of the Motion to Amend the Complaint. You should receive a copy of the filing shortly by fax.

[REDACTED]

Based on consultation with our client today, Bug Bam agrees to join in the motion and we are hopeful that it will bear fruit.

Sincerely yours, Martha Marrapese

Martha Marrapese, Esq.
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Washington, D.C. 20001
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From: Lieben.Ivan@epamail.epa.gov [mailto:Lieben.Ivan@epamail.epa.gov]
Sent: Wednesday, March 10, 2010 7:06 PM
To: Marrapese, Martha
Subject: Re: FW: Bug Bam; EPA FIFRA-09-2009-0013

Martha:

I am preparing a motion with Judge Gunning seeking reinstatement of the opportunity for ADR now that there is a new respondent to the proceeding. Can I state that Bug Bam either agrees with the motion or else will not oppose it? I believe that it would be a good use of all of our time discussing through some of these issues in ADR.

Thanks.

Ivan Lieben, Assistant Regional Counsel
U.S. EPA Region 9, 75 Hawthorne Street
San Francisco, CA 94105
(415) 972-3914

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In the Matter of Bug Bam Products, LLC, and Flash Sales, Inc.
Docket No. FIFRA-09-2009-0013

CERTIFICATE OF SERVICE


I hereby certify that the original of the foregoing Motion Seeking Initiation of the Alternative Dispute Resolution Process was filed with the Regional Hearing Clerk, U.S. EPA, Region IX, and that a copy was faxed and sent by Pouch Mail and first class certified return receipt mail, respectively, to:

The Honorable Barbara A. Gunning
Administrative Law Judge
Office of Administrative Law Judges
United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1900L
Washington, D.C. 20460
Facsimile: (202)565-0044

and to: Martha E. Marrapese
Keller and Heckman LLP
1001 G Street, N.W., Suite 500 West
Washington, D.C. 20001
Facsimile: (202)434-4646

Jacob Levy
Flash Sales, Inc.
4401 NW 167th Street
Miami, Florida 33055

3/12/10
Date


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Office of Regional Counsel
U.S. EPA, Region IX

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U.S. ENVIRONMENTAL PROTECTION AGENCY

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Fax Number (415) 947-3570, 947-3571

PLEASE DELIVER TO:

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| FAX # | <u>(202) 565-0044</u> |
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| OFFICE | |
| NAME | <u>MARTHA E. MARRAPESE</u> |
| FAX # | <u>(202) 434-4646</u> |
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| NAME | |
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